United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7564

To be argued by
Max Ander

B P/s

United States Court of Appeals

For the Second Circuit.

ALBERT L. BAILEY, JR., and BARBARA J. BAILEY,
Plaintiffs-Appellants,

against

HARTFORD FIRE INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

PLAINTIFFS-APPELLANTS' BRIEF

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(768)

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ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs-Appellant

No. 76-7564

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant-Appellee
- - - - - - - - - - - - - - - - - -

PLAINTIFFs-APPELLANT'S BRIEF

Statement of Facts

Plaintiffs, home owners of a one-family two-story dwelling in Staten Island, sought to recover on a Multi-Peril Home Owners Policy issued to them by defendant.

On July 13, 1975, 60 or 70 feet of a 90-foot long retaining wall of reinforce concrete collapsed, removing the pre-existing lateral support of the foundation wall and of the house wall which rested on the foundation wall of the plaintiffs' private dwelling.

The Department of Buildings of New York City Housing Development Administration on the very next day directed plaintiffs, husband and wife and their four children, to vacate their home. The private dwelling itself was rendered unsafe, dangerous and unfit for occupancy

and, therefore, the Department of Buildings subsequently issued a Notice of Unsafe Building and Structure, Order, Notice of Survey and Summons, which declared:

> "The above building is structurally unsafe due to collapse of 10-foot high and 50-feet long section of concrete retaining wall at rear lot line, which has left rear foundation wall without adequate support and subject to undermining and possible collapse." (Underscoring added)

The Supreme Court, Richmond County, issued a precept after proceedings were instituted by the Department of Buildings of the City of New York, commanding an order of demolition, unless the plaintiffs, per authorization from the said Department, were able to perform the work necessary to make their private home safe, or to demolish the structure. Plaintiffs promptly presented a claim against the defendant-insurance company under their Home Owners policy which was captioned to be a Multi-Peril Insurance Policy.

Plaintiff-husband wrote to defendant on July 20, 1975, without benefit of counsel, and in that letter indicated language to the effect, in layman terms, that when the retaining wall collapsed, the earth between the wall and the house also collapsed.

Noteworthy, in favor of plaintiffs, the defendant, by a duly authorized agent, denied the claim simply on the

"possibility that static water pressure behind the wall had caused the collapse." No other reason was given by defendant-insurance company for the denial of plaintiffs' claim.

Noteworthy, as well, is the fact that there is only a 5-foot distance between the retaining wall and plaintiffs' dwelling.

Plaintiffs retained an eminent consulting engineer, namely, Professor Daniel J. O'Connell, Professor O'Connell, as set forth in his affidavit in opposition to defendant's motion for summary judgment in the Court below, indicated that he was a licensed professional engineer since 1940 and taught engineering in Manhattan College, and became a professor in Engineering at that college in 1954. Professor O'Connell also listed that he lectured on Foundation and Design Reinforcement, and was a Director of Soil Mechanics at Manhattan College as well as being a consultant and engineer for the City of New York and for the Port Authority.

Professor O'Connell, in a report dated November 17, 1975, marked as Exhibit A with respect to defendant's motion for summary judgment, stated that the retaining wall which had collapsed on June 13, 1975, had a compressive strength of approximately 2500 pounds per square inch

and that two-thirds of the retaining wall had collapsed and was "just five feet away" from plaintiffs' frame dwelling. That report indicated that the retaining wall provided"necessary lateral stability for the foundation wall." Most significantly, Professor O'Connell, as an expert on the subject, stated unequivocally:

> "The collapse of the retaining wall thus removed the pre-existing lateral support of the foundation wall and the earth on which it rests. The loss of lateral support has rendered the rear foundation wall dangerous and totally unfit for its intended us to support the two-story and attic dwelling." (Underscoring added

Professor O'Connell continued by stating:

> "The structural stability of the dwelling has been seriously impaired, and complete collapse onto the adjacent property below will occur when the supporting soil is eroded away sufficiently. Indeed, partial collapse of the dwelling has already occurred. The foundation wall has cracked and two large vertical cracks are widened, due to the loss of its lateral support." (Underscoring added)

Then Professor O'Connell stated in the report:

> "Thus the rear wall of the dwelling must be properly shored up immediately to prevent total and irreparable collapse."

In Points 5 and 6 of Professor O'Connell's conclusions on page 4 of said report, he stated:

> 5. "The collapse of the retaining wall removed the pre-existing lateral support of the rear foundation wall of the 2-story dwelling, and has caused its partial collapse.
>
> 6. The loss of lateral support of the rear foundation wall has rendered it dangerous and totally unfit for the intended use."

Thus, tersely stated, bearing heavily on the question of proximate causality, Professor O'Connell said that the collapse of the retaining wall caused the dwelling to at least partially collapse and to become totally unfit as a place for plaintiffs' family to live.

Professor O'Connell, in hisaffidavit in opposition to the motion for summary judgment, swore to the fact that in August 1976 "the structural stability of the dwelling had been seriously impaired as a result of the collapse of the retaining wall on July 13,1975, resulting in a partial collapse of the dwelling." Professor O'Connell stated as well:

> "There was no 'earth movement' as there was no displacement of the center of gravity, and the expansion and contraction involved did not represent any movement of soil which in the instance at bar remained in place.

Plaintiffs impinge coverage on Paragraph 12 of said Home Owners Insurance Policy under the heading of "FALLING OBJECTS", and more importantly with respect to Paragraph 14, which reads as follows:

> "Collapse of buildings or any part thereof, but excluding loss to out-of-door equipment, awnings, fences, pavements, patios, swimming pools, underground pipes, flues, cesspools and septic tanks, foundations, retaining walls, bulkheads, piers, wharves or docks, all except as the direct result of collapse of building."

With reference to "collapse of building or any part thereof, said Paragraph 14 concludes as follows:

> "'Collapse' does not include settling, cracking, shrinkage, bulging or expansion."

As to additional exclusions, the policy reads that it does not insure against loss "caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to, earthquake, volcanic eruption, landslide, mud flow, earth-sinking, rising or shifting." Thus, it may be parenthetically factually stated that there is nothing in the Multi-Peril Home Owners Policy which states that the collapse, partially or wholly, of the building must occur directly due to its own weakness or from within its own particular confines. In fine, the collapse of the building, whole or in part, can result from other causes independent of its own

inner structure and four walls such as the collapse of the retaining wall, as indisputably happened, which was only five feet behind the insured's dwelling.

While there is exclusion from coverage if the collapse, in whole or in part, arises from settling, cracking, shrinkage, bulging or expansion within the building structure itself, it is not an unreasonable construction or interpretation that such exclusions cannot come into play as to noncoverage if settling, shrinkage, etc as above described occurs or arises by reason of the weakness or collapse of the retaining wall which thus, by a chain reaction, adversely affects the substantial integrity of the dwelling and its substantial fitness for use as a habitation. The policy exempted from coverage collapse of the retaining or foundation except as a direct result of the collapse of the building. It did not hold, on the other hand, since the policy does not expressly state that to be so, that there is exclusion from coverage if the building collapses from or as a result of the collapse of the retaining wall from settling, cracking, shrinkage, bulging or expension of the retaining wall. It is clear that the retaining wall or the foundation, as referred to in the

policy, even from the standpoint of an insurer, is not part of the building. Just as a hammer must be exercised consecutively and repeatedly to drive the nail home, we re-emphasize that the collapse of the dwelling need not be the initiating cause for its own breakdown or that the cause of the collapse must have its genesis in the dwelling, as being the first to collapse or weakness, since, without question, the retaining wall did collapse and seriously impair the integrity and use of the dwelling a mere 5 feet away. There is coverage under this policy or at least that is a question of fact for the jury to decide. For the Court tohave taken away those issues of fact from a jury was a violation of plaintiffs' constitutional rights with respect to a trial by jury.

PLAINTIFFS' ENUMERATIONS OF ERRORS OF LAW COMMITTED BY THE LOWER COURT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT AND THEN FINAL JUDGMENT AGAINST PLAINTIFFS

The District Court erred in numerous ways:

1. Granting summary judgment as a matter of law where there were mixed questions of law and fact as to which disputed exclusionary provisions in the Multi-Peril Home Owners Insurance Policy, the defendant-insurance company had the burden of proof to establish as being excepted from coverage.

2. The contract of insurance having been drawn by the defendant, any ambiguity must be resolved against it, and this is particularly so where exclusions are involved. The lower Court erred in holding that the language and terminology in the case at bar was not ambiguous and that by no reasonable process, based even on layman's thinking, could there be given any construction, even a single one, other than claimed by the defendant-insurance company.

3. The lower Court utterly ignored or overlooked that the burden is placed fully and squarely on the shoulders of defendant to establish, as a matter of law, that the property damage in the case at bar was unequivocally embraced in its claimed exclusionary clauses and that it was the burden of the insurance company that words such as "collapse" and "earth movement" have meanings and applications only in accordance with their construction, and are the only interpretations that can by rational process be placed thereon.

4. The words involved and their meanings were questions not to be determined as a matter of law by the lower Court, but were questions to be resolved by a jury, particularly where the policy was prepared and in effect mandated by the defendant-insurance company, and where extrinsic evidence could be offered on trial to aid the Court and jury

in determining that the proper legal cause is not always the meaning of the insurance carrier. Surrounding circumstances, other law decisions, the authoritative textbooks on the subject, the various definitions contained in standard dictionaries, are for the triers of the facts to determine whether there are different and diverse meanings as to the crucial words and terms at issue, namely, "collapse" and "earth movement." It was for the triers of the facts, being the jury in the case at bar, to fix the sense in which the words above alluded to were to be construed.

5. The lower Court, while straining (so to speak) through a narrow filament of hyper-technical language, to divert plaintiffs' professional expert from his actual statements in favor of plaintiffs, to that of being in support of defendant's position, thus obliterating said expert's true findings which were to the effect that there was at least a partial collapse, and no earth movement. Professor O'Connell's documentations supported substantial coverage and not otherwise.

6. The lower Court failed to consider that the drastic remedy of summary judgment must not be granted where there are at least "arguable", "genuine", not "feigned" issues, and it should not have resorted to "issue determination," whereas "issue finding" was the key to the matter.

Thus it was impossible, as a matter of law, without Court proof to determine the actual meanings and applicability of the terms and provisions at issue.

7. The Court below failed to invoke, nor did it articulate, upon such long established principles of legal construction and guidelines such as Ejusdem Generis Nocitur A Sociius and the Rules of Contra Profentum.

8. The lower Court grievously ignored and failed to take into account the basic proposition of Proximate Cause, in terms of the efficient or predominant cause for insured's property damage.

9. If the Court below had at all considered and utilized controlling Rules and Doctrines to gauge the meanings of terms and provisions, it would not have granted summary judgment, and may have, in turn, granted summary judgment instead to plaintiffs.

10. The Court below unduly relied on the weak reed of Graffeo v. U.S. Fidelity & Guaranty Co., 2nd Dept., 20 A.D.2d, 643, 246 N.Y.Supp.2d 258, and Weiss v. Home Owners Co., 3rd Dept.,1959, 9 A.D.2d 598, 189 N.Y.Supp.2d 355, cases which were readily distinguishable as to the facts and nonapplicable as to certain aspects of the law which have since changed in the march of the judiciary towards a fairer, more liberal and equitable appraisal of the terms and conditions of insurance policies drawn sedulously by the experts for the insurance companies.

The trend of the law as enunciated in plaintiffs' briefs in the lower Court has been increased and liberalized in favor of the policyholder in his role as a consumer and purchaser of services in the form of insurance.

11. The Court below unwarrantedly denigrated Nixon v. Liberty Mutual Ins. Co., 4th Dept., 16 A.D.2d 803, 228 N.Y.S.2d 450, in its unpersuasive attempt to relegate said decision into the legal graveyard of "bad law." The Nixon case marched in time and step with the current trend of law on the subject of Insurance Law. Also the Court below failed to grasp the basic import of Government Employees Ins. Co. v. DeJames, 1970, 256 Md.717, 261 A.2d 747, as constituting the prevailing law, and failed to give due attention and recognition to other decisional law and textbook authority cited by the Plaintiffs as being in accordance with viable precedent and in accordance with contemporary jurisprudence.

POINT I

THE DEFENDANT-INSURANCE COMPANY HAVING FAILED TO DEFINE THE TERM "COLLAPSE", THAT WORD IN QUESTION, HAVING MORE THAN ONE DEFINITION, MAY BE GIVEN A BROAD MEANING TO BE CONSTRUED AGAINST DEFENDANT

Eamotte v. Employer Commercial Ins. Co., 45 A.D. 2nd 748, 372 N.Y.Supp.2d 712 (1975 1st Dept.), aff'd unanimously by the Court of Appeals on November 16,1976 (as appearing in the New York Law Journal Nov. 19,1976) is the latest and final word as to the law involved herein. In the Eamotte case, the defendant-insurer issued a theft policy on plaintiff's yacht wherein the yacht was required to be laid up and out of commission during the cold seasons of the year. Coverage thereupon depended on whether it was to be laid up "afloat or ashore", or either. The yacht was laid up afloat and not on the land, whereupon the defendant-insurance company therein refused to make payment stating that plaintiff violated his lay-up warranty in derogation of the aforesaid terms of the policy.

The Trial Court dismissed plaintiff's complaint which the Appellate Division of the Second Department reversed and in turn granted judgment to the plaintiff Eamotte on the ground that:

> "Plaintiff did not indicate on the application whether the boat would be laid up afloat or ashore. He was nevertheless issued the theft policy containing the lay-up warranty. The law is well settled that 'in contracts of insurance where a doubt exists as to the meaning of words contained therein which may be construed either in a strictly literal sense or in a broad sense, that these words must be given the broad meaning because the insurance carrier has it within its power to spell out clearly all of the terms and conditions in plain, concise, unambiguous and understandable language. Failing to do so, the words in question must be construed against it.' (Providence Washington Ins. Co. v. Lovett,D.C., 119 F.Supp.371,375. Accordingly, the lay-up warranty of the policy must be read to include wet storage as well as dry storage. Plaintiff therefore complied with the warranty, when he had the boat winterized and left in the water..." (Underscoring added)

Webster's Dictionary (3rd New International) published in 1964 devotes at least 100 lines setting forth interminably different definitions of the word "collapse", ranging from defendant's literal version of"breaking down completely, crumbling into nothingness, falling into a jumbled or flat mass," to the broader scope definition of "to suddenly lose force, significance, effectiveness or worth, losing ability to perform to accustomed activities."

One of the two most recognized textbooks on the subject is Couch on Insurance. According to Couch, Sec. 48,173, there is a collapse within the meaning of

the policy where there is a "loss of connection with other parts." That treatise also states: "It is not necessary that the walls or other parts of the building actually fall down or together into an irregular mass or...within the abstract definition of 'collapse.'"

It is also stated therein that a "collapse" can result from loss of supports so as to materially impair their function and render the building or dwelling, as the case may be, unfit for habitation.

The other leading insurance textbook is Appelman Insurance Law and Practice, who has stated in Volume 5 under Subd. 3088.25 under the caption of "FALL OR COLLAPSE OF BUILDING COVERAGE" that "The more liberal line of authorities generally hold that there can be a collapse although there is no falling, tumbling down or reduction to rubble of the building or part thereof." Appleman indicates that there can be a collapse within the protection of the policy where there has been a substantial impairment of the basic structure or substantial integrity of the building.

As research of the law throughout the land reveals, the plethora of decisions rather than the minimal now hold that a collapse of a building can be most broadly

defined, considering too that such determination is fortified by the Eamotte case, supra, holding that where the insurance company fails to define, it is obligated to protect along the lines of the broadest definition of the term or terms.

A case uniquely in point and in favor of plaintiffs is Gullett v. St. Paul Fire & Marine Ins. Co., 446 F.2d 1100 (1971) - (7th Circuit). In that case the Circuit Court affirmed recovery for damage to a building arising from the fall of the retaining wall crashing into plaintiff's building. As therein stated at page 1102:

> "The vital jury question was whether the damage to the building was caused by 'falling objects' or 'collapse of building' and thus covered by the terms of a rider to the policy or whether it was caused by a 'landslide or any other earth movement' and excluded from coverage. On defendant's motion the court submitted a special verdict asking the jury to decide these questions. The jury answered that the damage was caused by falling objects or collapse of building; that it was not caused or aggravated by, was not contributed to, and did not result from a landslide or any other earth movement, and returned its verdict for plaintiff." (Underscoring added)

The Gullett case also stated:

> "...The crucial fact question at trial was whether the rocks fell first from disintegration of mortar pressure of the earth, and the earth then pushed the rocks, or whether the earth moved by rain water forced the wall to collapse and the collapse caused the rocks to crash onto the building."

As in the Gullett case, it may also be inferred, not to be removed from the jury's consideration, that in said case the retaining wall gave way and within the exclusionary clauses, such proximate, predominant, efficient elements caused the building to collapse as encompassed by plaintiff's definition of said term, rather than defendant's exclusionary claims. It may be noted that in the Gullett case, that the Circuit Court acknowledged that, literally speaking, earth movement took place, but that the Ejusdem Generis rule limited that general term to the prior types of earth movement specified in the exclusions, similarly applicable in that case and that of the case at bar, namely, earthquake, volcanic eruption, landslide and like abnormal movement. Even though the Maryland courts in 1970 had not then adopted the rule in New York that an insurance policy is to be most strongly construed against the insurer, Government Employees Ins. Co. v. DeJames, 261 A.2d 747, 256 Md.717 (1970) nevertheless held that

> "A serious impairment of structural integrity is a collapse within the policy coverage"

(citing cases from a multitude of State courts such as)

Morton v. Great American Ins. Co.,
77 New Mexico 35, 419 P.2d 239, 1966;

Rogers v. Maryland Casualty Co.,
252 Iowa 1096, 109 N.W.2d 435 (1961);

Anderson v. Indiana Lumbermen's Mut. Ins. Co.,
127 So.2d 304 (Court of Appeals of Louisiana - 1961);

Allen v. Hartford Fire Ins. Co.,
187 Kan, 728, 359 P.2d 828 (1961);

Bradish v. British American Assur. Co.,
9 Wis. 2d 601, 101 N.W.2d 814 (1960);

Travelers Fire Ins. Co. v. Whaley,
272 F.2d 288 (10th Cir. 1959)

The lower Court erred in placing crucial reliance of Graffeo v. U.S. Fidelity & Gty Co., 20 A.D.2d 643, which differs factually almost as night from day with respect to the case at bar and also with respect to the specific exclusion actually involved in the Graffeo policy. The property damage in that case concerned itself on an agreed statement of facts as to "settling of a concrete slab under a split level home." The term "settling" unlike the word "collapse" was obvious and unambiguous term and no broad connotations could be placed as to the meaning of the word "settling."

In studying the Record on Appeal in the Graffeo case, there was no allegation in the agreed statement of facts that there was any collapse either in whole or in part of the dwelling as claimed in the case at bar; and the damages in the Graffeo case were minor, in addition to the fact that the dwelling therein, unlike the case at bar, was not rendered unsafe, unusable or uninhabitable.

The lower Court herein also relied unduly upon Weiss v. Home Ins. Co., supra. In that case, the policy clearly and unambiguously limited coverage with respect to collapse only if caused by the weight of ice, snow or sleet. In that case, nisi prius, it was held, after trial, from the evidence that it could be readily determined that the damage was due solely to age or slow deterioration. The clear nonapplicability of the Weiss case is fully discussed in Morton v. Travelers Indemnity Co. 171 Neb.433, 106 N.W.2d 710 (1960)(at page. 719).

The Morton case, supra, is invaluable for the following precepts and guidelines favorable to plaintiffs herein and which are to be followed:

> 1. "If the contract was prepared by the insurer and contains provisions reasonably certain to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted." (p.714)
>
> 2. "In the light of such authorities relied upon by plaintiffs, it cannot be reasonably assumed that a person purchasing insurance for his home, including coverage for direct loss by 'collapse of the building or any part thereof' understands such phrase as providing coverage if only his home or at least a part thereof, falls together in an irregular mass or flattened form. Otherwise the home owner would be purchasing little if any added protection (p.721)

Nixon v. Liberty Mut., supra, so utterly ill considered by the lower Court is not a mutation in Insurance Law, nor a pariah of dubious origin. Mr. Justice William Lawless, in his opinion on the trial level was affirmed by the Appellate Division of the State of New York, 4th Dept., and has full legitimacy not only for having been seriously discussed by both Couch and Appelman in their texts but also in the light of precedent and later controlling cases.

Please note the findings of Mr. Justice Lawless in his decision as set forth in the record on appeal in the Nixon case to the effect stated:

> "The insurance company prepared the contract, was responsible for the language used, and since the terms of the policy are susceptible to more than one interpretation and are ambiguous, the uncertainty and ambiguity must be resolved in favor of the policy-holder and against the company.
> See Sincoff v. Liberty Mut. Fire Ins. Co., 207 N.Y.Supp.2d 178 at p.182.
> Paragraph 15 insures against collapse of the building or any part thereof which would clearly indicate that it is not necessary for the collapse to affect the entire building."

The decision of Mr. Justice Lawless sitting in the Supreme Court, Erie County, presaged the holding of Kronfeld v. Fidelity & Cas. Co. of New York, 1st Dept., decided by the Appellate Division, on July 13,1976, no official citation, 385 N.Y.Supp.2d 352 appearing on the front page of the New York Journal

on August 24,1976. The concise decision by Mr. Justice Munez echoes the Trial Court in the Nixon case and is also a concise summary of the law to the effect:

> "New York law is clear that all ambiguity must be resolved in favor of the policyholder and against the insurer. Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 390, 230 N.Y.S.13, 15, 180 N.Ed 899, 901; Silverstein v. Commercial Cas. Ins. Co., 237 N.Y.391, 143 N.E.231. Where a question of fact exists as to insurance coverage limitation, the burden is 'on the defendant to establish that the words and expressions used not only are susceptible of the construction sought by defendant (insurance company) but that it is the only construction which may fairly be placed on them.' Lachs v. Fidelity & Cas. Co. of N.Y., 306 N.Y.357, 365, 118 N.E.2d 529, rehearing denied, 306 N.Y.941, 120 N.E.2d 216, see also Hartol Products Corp. v. Prudential Ins. Co., 290 N.Y.44, 49, 47 N.E.2d 687, 690. The burden is upon the insurer to prove that coverage does not exist. Sincoff v. Liberty Mut. Fire Ins. Co.,supra, Lachs v. Fidelity & Cas. Inc.Co. of N.Y.,supra. The clause itself must afford clear notice of non-coverage. Janbeck v. Metropolitan Life Ins. Co., 162 N.Y.574, 577-572, 57 N.E. 182,183. The meaning of the terms is that which they convey to the average man. McGrail v. Equitable Life Assurance Soc'y, 292 N.Y.419, 424, 55 N.E.2d 485, 486; Tonkin v. Cal. Ins. Co., 294 N.Y.326, 329, 62 N.Ed. 215, 216 and not any special meaning in the trade. Levine v. Accident & Cas. Ins. Co., 203 Misc.135, 112 N.Y.S.2d 397.

POINT II

THE COURT BELOW IGNORED OR OVERLOOKED VARIOUS RULES AND PRINCIPLES JUDICIALLY NECESSARY TO CONSTRUE THE TERMINOLOGY OF THE INSURANCE POLICY.

The lower Court, it is respectfully submitted, failed to give due heed to the precept of Chief Justice Lord Mansfield in Jones v. Randall (1774) Cowp 337, 39 to the effect:

> "But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as to particular circumstances of each have been found to fall into within the one or other of them."

The lower Court failed to give any recognition nor to adopt the following rules needed for the proper construction of insurance terminology:

Rule of Ejusdem Generis

Rule of Noscitur A Sociis

Rule of Contra Proferentum

As stated in Gullett v. St. Pauls Fire & Marine Ins. Co., supra, which parallels the case at bar so closely, the principle of Ejusdum Generis is a mandatory tool and test in ascertaining and gauging whether "earth movement" must be taken literally, thus voiding coverage or limiting that general term to the prior type of "earth movement" such as earthquakes, volcanic eruption or landslide.

Surely if the Court below had applied or even truly comprehended that and other enunciated principles, summary judgment would not have been granted against plaintiffs herein. It might very well have been that summary judgment would have been granted for plaintiffs, as reflected in Popkin v. Security Mutual Ins. Co. of New York, 48 A.D.2d 46, 1st Dept. 1975. In that case, the Appellate Court granted summary judgment but in favor of plaintiff where water damage resulted by reason of a break in the city water main. The exclusions in the policy in that case provided that the policy did not insure against loss by flood, surface water, waves, etc. as well as water below the surface of the ground, including that which exerts pressure on or flows, seeps or leaks through sidewalk driveways, etc. In the Popkin case, defendant claimed exemption from coverage within the ambit of the exclusionary clause exempting floods.

The Popkin case defined and then followed the following maxim:

> "Noscitur A Sociis is an old fundamental maxim which summarizes the rule both of law and of language that associated words explain and limit each other. In effect, it is a rule of construction whereby the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it."

It was also stated in the Popkin case:

> "'Where comprehensive words in a contract are followed by an enumeration of specific things, under the rule of Ejusdem Generis the things coming within the comprehensive words will be limited to those of a like nature to those enumerated.' (10 N.Y.Jur. Contracts, Subd.217). The underlying authority is the application of the Ejusdem Generis rule is the rule of construction known as Noscitur A Sociis delineated above."

In Government Employees Ins. Co. v. DeJames, supra, the language of the policy as to "earth movement" was identical to that in the case at bar. In that case, it was held:

> "While the doctrine of Ejusdem Generis as usually relied on when a generic term follows an enumeration of specifics, we are unwilling to say that it is wholly inapplicable here. We therefore construe 'any earth movement' to mean unusual movement of the same nature and character as those specified. Consequently the exclusion could not encompass damage occasioned by normal pressure... unless they were spelled out in the exclusionary clause. To hold otherwise would make virtually meaningless the coverage which was purportedly covered by the policy, for it would be difficult to envision any other reasons why a house would collapse."

In 1975 a Federal Court in Peach State Uniform Service, Inc. v. American Ins. Co., (1975) 507 F.2d 996, came to the same conclusion by holding:

> "There is no clear manifestation here of an intent not to limit the general term 'other earth movement' in thispolicy to events of the same nature as earthquakes, volcanos and landslides. Taking the phrase in its contractual context, then, and continuing to resolve ambiguity in favor of the insured, we read other earth movement as referring only to phenomena related to forces operating within the earth itself and not to the merely superficial effects of external forces as erosion by run-off earth water. There isno evidence in this record that Peach State's loss might have resulted from hydrostatic pressures or other forces working within the earth itself. The construction of this ambiguous exclusion, like the water damage exclusion, was for the District Court, and in view of the lack of evidence to show that Peach State's loss resulted from earth movement properly construed Peach State was entitled as a matter of law to a judgment entered in its favor on the applicability of exclusions."

The doctrine of Contra Proferentum holds that "an ambiguity in non-negotiated or adhesion contracts are to be construed against the profferor, here the insurer."

See Cintron v. Hartford Accident & Indemnity Co., 86 Misc.2d 26 (1976), affirmed by the Appellate Term, Second Department 1976 (11/16/76). Generally appended to the invocation of that doctrine are the observations by the deciding Courts that the insurance carriers could

and should have specifically defined the language at issue.

The landmark decision in point is Hartol Products Corp. vs. Prudential Insurance Co., 290 N.Y.44 (and note the progression of legal reasoning commented upon therein). The Court in that case is quoted to the effect:

> "We do not deny the right of an insurance company to make just such a contract as the defendants claim to have made in the present instance. But insurance contracts, above all others, should be clear and explicit in their terms. They should not be couched in language as to the construction of which lawyers and courts may honestly differ. In a word, they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import."
> (Underscoring added)

Judge Rippey, in the Hartol case, then cited Equitable Life Assur. Society v. Dvess, 194 Arkansas 1023 which said:

> "If appellant meant to exclude liability... why did it not say so in such plain language that a wayfaring man, though a fool, might not be deceived thereby? It would appear a simple thing for a great institution such as appellant, to write a clause in its policy exempting itself from such liability in plain and simple language."

Thus the Court in the Hartol case postulated:

> "The question is simply whether the average man, in applying for insurance and reading the language of this policy at the time it was written would ascribe the meaning to that language which the insurance company here urges."

Similarly the oft-cited cases are:

Sincoff v. Liberty Mutual Ins. Co.
11 N.Y.2d 386 (1962);

Eamotte v. Employers Commercial Union, supra;

Kratzenstein v. Western Assurance Co.
116 N.Y. 54 at p.59 (1889);

Sassi v. Jersey Trucking Service,
283 A.D. 76, 126 S.2d 389;

Miller v. Continental Ins. Co.,
Ct. of Appeals, decided 11/23/76, NYLJ 12/1/76;

Cresthill Industries v. Provident Washington,
53 A.D.2d 488, 386 N.Y.S.2d 797 (1976, 1st Dept.)

The Court below, in discussing Cantanucci v. Reliance Ins. Co., 43 A.D.2d 622, 349 N.Y.Supp.2d 187, aff'd 35 N.Y.2, 890 (1973), did not sift the "wheat from the chaff" in adopting a contra rigid position adverse to plaintiffs herein. The lower Court failed to take cognizance of the use in Cantanucci of the principle of Contra Proforentum in which that case held:

> "Had the defendant wished to create such a distinction as to include coverage only for accidental discharge, leakage or overflow which takes place below the surface, it could have done so by express language to that effect. By construing the exclusion to apply to only water below the surface due to natural causes, effect is

> given to the well settled principle that provisions of an insurance policy are to be harmonized and that ambiguities must be resolved in favor of the insured. A construction favorable to the insurance company will only be sustained where it is the sole construction which can fairly be placed upon the words employed."

For the Court below to ignore that the words "Collapse" and"earth movement" used particularly in context with abnormal earth or water activities can be ambiguous and to convey differing means to reasonable laymen is to fly in the face of all legal reality and to deny out of hand the controversies that have raged throughout the courts of this land as to the ambiguous and conflicting meanings of the terms "collapse" and "earth movement."

If the classic controlling New York case, Lachs v. Fidelity & Cas. Co. of New York, 306 N.Y.357, 54, found the highest Court in New York split 4-2 as to the meaning of "Civilian Scheduled Airlines", then how could the average layman with respect to such terms as "earth movement", in its context, and "collapse" be possibly expected to be in full accord with defendant insurance company's version of the meanings of "collapse" and "earth movement"?

POINT III

THE ACKNOWLEDGED COLLAPSE OF THE RETAINING WALL WAS THE PROXIMATE CAUSE OF THE PROPERTY DAMAGE TO THE DWELLING HEREIN.

As stated in Cresthill Industries, Inc. v. Providence-Washington Ins. Co., 53 A.D.2d 488, 385 N.Y.Supp.2d 797 (2nd Dept. 1976):

> "Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. An incidental peril outside the policy contributing to the risk insured against will not defeat recovery, nor may the insurer defend by showing that an earlier cause brought the loss within a peril insured against where the insured peril was the last step prior to loss. In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk. (3) Appleman, Insurance Law and Practice, Section 3083, pp.309-311 and cases cited."

The venerated Judge Cardozo in Bird v. St. Paul F. & M. Ins. Co., 224 N.Y. Supp 49 (1918) provided such an abundance of superlative insights as to make it clearly manifest that in the case at bar, the controlling, efficient, predominant cause of the tragic occurrence to plaintiffs' dwelling was the admitted collapse of the retaining wall, and not the minute ancillary activities which the Court alluded to in his decision. The holding of the Court below was contary to the finding of Judge Cardozo at page 53 of Bird v. St. Paul, supra, where he determined:

> "Especially in the Law of Insurance, the rule is that 'You are not to trouble yourself with distant causes' and also '...in an action on a policy the causa proxima is alone considered in ascertaining the cause of loss.'"

While the Court below paid token service to the established doctrine of causality, in essence, he did not follow it de facto. (See page 9 of its decision.)

Furthermore, the language in the Cresthill Industries case, supra, utterly refutes the holding of Judge Dooling as to the exclusionary powers of

contributing, non-covered causal factors. The Cresthill case stated:

> "When there are two concurrent causes of a loss, the predominant, efficient one must be the proximate cause."

See also Champion International Corp. v. Continental Cas. Co. (2nd Circuit) decided December 9, 1976, N.Y.L.J. front page 1/4/77 which states that coverage is not established by antecedent causes secondary to the primary and predominant cause.

POINT IV

IT WAS EGREGIOUS ERROR UNDER ANY CIRCUMSTANCE TO HAVE GRANTED THE DRASTIC REMEDY OF SUMMARY JUDGMENT

It is hornbook learning, as stated in Sillman v. Twentieth Century-Fox Corp., 3 N.Y.2d 405:

> "This drastic remedy should not be granted where there is any doubt as to the existence of such issues... or where the issue is arguable...; issue finding, rather than issue determination is the key to the procedure."

Judge Cardozo, in the memorable case of Curry v. Mackenzie, 239 N.Y.267 (1925), maintained, with respect to summary judgment:

> "To justify a departure from that course and the award of summary relief, the Court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."

As stated in the oft-cited case of Esteve v. Abad, 271 A.D.725 (1st Dept. 1947):

> "Where, as here, there are fact issues and a trial by jury is seasonally demanded, plaintiff is entitled as a matter of constitutional right to such a trial... that fundamental right was lost to plaintiff in the American Surety Co. case. The higher Court held that the exclusionary provision as to loss or damage caused by flood could not be determined as a matter of law where damage was occasioned by 'the flooded conditions of the street... due to an unusually heavy rainstorm.'"

W. S. Hayes, Inc. v. Public Service Mut. Ins. Co., 12 A.D.2d 989, 212 N.Y.Supp.2d 89 (4th Dept.1961) stoutly maintained that ordinarily speaking, the wording of a contract is a question of fact unless

> "the evidence is so clear that no reasonable man would determine the issue before the court in any way but one, the court will itself determine the issue... Extrinsic evidence may be offered upon the trial to aid the court and jury... The proper legal meaning...is not always the meaning of the parties. Surrounding circumstances may stamp upon the contract a popular or looser meaning." (Underscoring added)

CONCLUSION

The order and judgment appealed from should be reversed and the case herein either remanded for trial, or summary judgment granted in favor of plaintiffs instead of defendants.

Respectfully submitted,

MAX .NDER
Attorney for Plaintiffs

Service of two copies of
the within is
hereby admitted this 17th day
of January, 1977

Kirkland & Ryder
Attorney for Defendant